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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FEDERICO CASTELAN SAYRE, Plaintiff and Appellant, v. JOAN KELLER SELZNICK, Defendant and Respondent.	B203507 (Los Angeles County Super. Ct. No. BC357394)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ann I. Jones, Judge. Affirmed.

The Law Offices of Federico C. Sayre, Federico C. Sayre and Leon C. Summer for Plaintiff and Appellant.*

Cole & Loeterman and Dana M. Cole for Defendant and Respondent.

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* California Rules of Court, rule 8.204(b)(10)(D), provides that the cover of a brief must state the name, address, telephone number, and California State Bar number of each attorney filing the brief. Appellant has violated this rule in two ways. First, appellant's briefs state that Mr. Sayre's bar number is 37429. Our review of the state bar website, however, indicates that 37429 is the bar number of another individual. Second, a "Leon C. Summer, Esq." signed appellant's opening brief on behalf of Mr. Sayre's law office. However, no information regarding Mr. Summer is provided on the cover.

INTRODUCTION

Plaintiff and appellant Federico Castelan Sayre is an attorney who represented defendant and respondent Joan Keller Selznick in a personal injury case (the underlying action). In this case, Sayre seeks to recover from Selznick in excess of $50,000 in costs he advanced in the underlying action. After a bench trial, the trial court entered judgment in favor of Selznick, and then denied Sayre's motion for a new trial. We affirm.

The only cause of action Sayre asserted in his complaint was for breach of contract, specifically breach of the written retainer agreement he and Selznick executed. That contract, however, was voidable because Sayre failed to provide Selznick a duplicate copy of it, as required by Business and Professions Code section 6147 (section 6147.) During trial, Selznick exercised her right to void the contract. The trial court thus correctly entered judgment in favor of Selznick on Sayre's sole cause of action.

Prior to the close of trial, Sayre orally moved for leave to amend his complaint to add a quantum meruit cause of action. The trial court denied the motion. We hold that the trial court did not abuse its discretion in doing so. Sayre's unexcused delay in seeking leave to amend unfairly prejudiced Selznick. Further, for reasons we shall explain, Sayre's quantum meruit claim failed on the merits and was barred by the statute of limitations.

In his motion for a new trial, Sayre asserted two principal arguments. First, Sayre argued that he should be given a new trial on his new theory of conversion. Sayre contended that Selznick converted his money when he advanced costs purportedly on Selznick's behalf. As a matter of law, however, Sayre could not prevail on his conversion claim because Selznick did not exercise any dominion or control over Sayre's money. Sayre also argued that he should be given a new trial because of an "irregularity of the proceedings," namely the alleged bias of the trial court shown by the trial court's questioning of Selznick. Our review of the record, however, reveals no such bias. We therefore hold that the trial court did not abuse its discretion by denying Sayre's motion for a new trial.

Finally, Sayre requests that we vacate the judgment in order to grant him leave to amend his complaint to assert an open book account cause of action. Sayre did not seek to assert this cause of action in the trial court. We decline to grant Sayre leave to amend because Sayre has failed to show that under the undisputed facts in the record he can prevail on an open book account cause of action.

BACKGROUND

1. *Underlying Action*

In February 1999, Selznick tripped over a speed bump, fell and hit her head on the ground. As a result, she sustained brain injuries which affected her cognitive abilities. The accident occurred at a resort in Tecate, Mexico.

With the assistance of an attorney, Selznick in propria persona (pro per) commenced the underlying action against the owner of the resort and other defendants. Shortly thereafter, in early 2000, Selznick met Sayre to discuss Sayre's representation of her in the underlying action.

At the initial meeting, Selznick did not sign the retainer agreement at issue. In April 2000, Selznick and Sayre executed what Sayre described as his "standard contingency agreement."[1] This agreement provided that Sayre's law office would represent Selznick in the underlying action.

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[1] The agreement stated in part: "The undersigned [Selznick] covenants and agrees to pay said attorneys for all costs and expenses incurred in advance and a fee of thirty-three and one-third percent (33-1/3%) of all sums received from any and all sources whatsoever if said matter is settled before Mandatory Settlement Conference or Trial Setting Conference; and forty percent (40%) if settled after Mandatory Settlement Conference, Trial Setting Conference or within one hundred (100) days of trial. The contingent fee schedule . . . is . . . in compliance with Business and Professions Code, Section 6147. IF NO RECOVERY IS OBTAINED, The Attorneys WILL RECEIVE NO FEE. [¶] . . . [¶] At all stages of the proceedings, the undersigned agrees to pay all the necessary costs, including, but not limited to court costs, jury fees, charges for depositions, investigation costs and expert fees plus any other costs which may be incurred in the proper presentation and trial of said action. The Attorneys shall advance these costs on behalf of the undersigned in which case such costs are to be reimbursed either directly by the undersigned or disbursed directly out of the proceeds of the action from the undersigned's share of those proceeds."

Sayre claims that at their initial meeting he advised Selznick that there was a conflict of laws issue, namely that it was unclear whether the law of Baja California Norte, Mexico (Mexican law), or the law of the State of California (American law) would apply to Selznick's claims in the underlying action. At that time, Sayre determined that American law would "probably" be used by the court.

In Sayre's view, the choice of law issue was critical to Selznick's case. It was Sayre's understanding that under Mexican law Selznick could not recover damages if she was found to be even 1% at fault for the accident. Further, Sayre believed that under Mexican law, Selznick could only recover the cost of her medical bills and could not be compensated for her pain and suffering.

Sayre claims that at the initial meeting he had with Selznick, he informed her about the limitation of the damages she could recover if Mexican law applied. Selznick denies that Sayre provided such an explanation.

Sayre and Selznick also disagree about what they discussed at their initial meeting regarding costs in the underlying action. Sayre contends that he told Selznick that he would advance costs, and that he would be reimbursed "out of the case" or by Selznick in the event of an unsuccessful conclusion. Selznick contends that Sayre said that she would not have to pay for expenses if the case was unsuccessful.

In May 2003, Sayre's associate sent a letter to Selznick stating: "After extensive research and analysis, we have come to the conclusion that is it likely that the court will apply Mexican law on the issues of liability and damages in the [underlying] action. As a result, we strongly recommend that we initiate settlement discussions with opposing counsel and attempt to obtain the most favorable disposition possible based upon application of Mexican law."[2]

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[2] Selznick contends that Sayre's failure to come to this conclusion earlier was the result of inadequate legal research. In July 2000, Sayre received a letter from counsel for defendants in the underlying action outlining the reasons why Mexican law applied. In that letter, counsel for defendants cited *Hernandez v. Burger* (1980) 102 Cal.App.3d 795 (*Hernandez*). Sayre also cited *Hernandez* in his May 2003 letter to Selznick. Sayre, however, contends that his analysis changed because the court granted the California

The case did not settle. Instead, it took a turn for the worse for Selznick. In response to a motion in limine, the court decided that Mexican law applied to Selznick's claims. Selznick filed a petition for a writ of mandate with the Court of Appeal to overturn that ruling, but the petition was denied.

In May and June of 2004, Sayre's office sent letters to Selznick advising her that if she proceeded to trial she would, at best, recover approximately $20,000. Sayre further advised Selznick that while she could "try the case by the expenditure of [an] additional $20,000," he recommended attempting to reach a consent judgment with the defendants, so that she could appeal the choice of law ruling by the court.

Selznick's response was that she wanted to try the case. Sayre thought that "it didn't make any sense" to try the case because they would have to spend an additional $20,000 to recover at most $19,000 in medical bills before an appeal of the choice of law issue was possible. Accordingly, over Selznick's objection, Sayre filed a motion to be relieved of counsel, which was granted in October 2004.

Sayre claims that Selznick proceeded in pro per, and that the underlying case was dismissed thereafter. However, Sayre has not cited anything in the record to support this claim.

2. *The Parties Dispute Whether Selznick Must Reimburse Sayre for Costs He Incurred*

As the underlying action progressed, Sayre made payments of expenses he purportedly incurred on behalf of Selznick. These costs included expert witness fees, copying and mailing costs, court filing fees, and legal research expenses. Sayre did not get pre-approval of these costs from Selznick, nor did he send her periodic statements informing her of the accumulating cost bills. Selznick did not ask for cost bills because she believed she did not have an obligation to reimburse Sayre for costs he advanced.

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defendants summary judgment, thereby reducing the interest of the State of California in the case.

With Sayre's June 3, 2004 letter to Selznick, he enclosed a copy of his cost bill, which was $49,965.99 as of that date. Sayre further advised Selznick that if she did not pay the cost bill, he would commence arbitration or litigation against her. Selznick claims that around the time Sayre was seeking to withdraw as her counsel in the underlying action, she learned for the first time that he was seeking reimbursement of about $50,000 in costs.[3] Selznick refused to pay Sayre the money he demanded.

3. *Procedural History of This Action*

On August 22, 2006, Sayre commenced this action against Selznick by filing a Complaint for Damages. In his complaint, Sayre asserted one cause of action for breach of contract based on Selznick's alleged breach of the retainer agreement.

One year later, on August 22, 2007, a bench trial commenced. Sayre testified on his own behalf as his only witness, and rested his case. Sayre then left for Mexico on business, leaving the prosecution of his case to an associate.

On the following day, August 23, 2007, Selznick moved for a "directed verdict" on the ground that she was not obligated by the retainer agreement to reimburse Sayre for costs if the underlying case was unsuccessful. The trial court stated that it considered this motion as "essentially" a motion for judgment under Code of Civil Procedure section 631.8.[4]

Prior to ruling on the motion, the court raised the issue of whether the retainer agreement was "voidable" under Business and Professions Code section 6148 (section

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[3] The final cost bill totaled $56,145.50.

[4] "After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party . . . or may decline to render any judgment until the close of all the evidence." (Code Civ. Proc., § 631.8, subd. (a).)

6148)[5] in light of Sayre's admission at trial that he could not recall whether he gave Selznick a copy of the retainer agreement.[6] After the trial court raised the issue, Selznick's counsel stated: "I actually saw that also last night." Sayre's attorney responded by orally moving to add a quantum meruit cause of action. The court declined to rule on both Sayre's motion and Selznick's motion, stating that it would wait until Selznick presented her evidence before doing so.

On the next day, August 24, 2007, after Selznick completed her testimony, Sayre renewed his motion to add a quantum meruit cause of action. The court denied the motion on three grounds: (1) Sayre's delay in seeking to amend his complaint had caused significant prejudice to Selznick; (2) Sayre's quantum meruit cause of action was barred by the statute of limitations; and (3) quantum meruit allowed Sayre to recover fees, not costs.

The court then asked Selznick whether she would exercise her option to void the retainer agreement. Selznick, through counsel, stated that she would in fact void the agreement.[7] The court then granted Selznick's motion for a judgment pursuant to Code of Civil Procedure section 631.8.

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[5] Section 6148 provides: "(a) In any case not coming within Section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars ($1,000), the contract for services in the case shall be in writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative. . . . [¶] . . . [¶] (c) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee."

[6] Selznick subsequently testified that she was never provided a copy of the signed retainer agreement, despite repeatedly asking for it.

[7] At oral argument Sayre claimed that there was nothing in the record indicating that Selznick exercised her option to void the contract. This is simply not true. At the hearing on August 24, 2007, the following exchange took place between the trial court and defendant's counsel, Dana M. Cole: The Court: "On the old-fashion complaint, you are going to exercise your right to make the contract voidable? [¶] Mr. Cole: Correct."

On September 17, 2007, the court entered judgment for Selznick and against Sayre. Sayre filed a motion for a new trial on September 28, 2007. Sayre argued, inter alia, that he could assert a conversion cause of action, and that the statute of limitations for conversion was three years. Sayre also argued that he should be granted a new trial because the trial court showed unfair bias in favor of Selznick, and this constituted an "irregularity in the proceedings." The court, however, denied the motion.

Sayre timely appealed the judgment.

CONTENTIONS

Sayre contends that the trial court erred by denying his motion for leave to amend his complaint to add a quantum meruit cause of action. Section 6148 does not, Sayre argues, preclude him from seeking reimbursement of costs, even if the retainer agreement was void. Sayre also argues that Selznick was not prejudiced by any delay in Sayre's motion for leave to amend.

Sayre also contends that the trial court erred by denying his motion for a new trial. He argues that under the three-year statute of limitations applicable to conversion causes of action, his action was not time-barred. Sayre further contends that he should be given a new trial because the trial court was improperly biased against him. This bias, Sayre claims, was shown when the trial court conducted its own questioning of Selznick.

Finally, Sayre argues that this court should grant him leave to amend his complaint to assert an open book cause of action. Sayre contends that his action is not time-barred because the statute of limitations for an open book account cause of action is four years.

DISCUSSION

1. *Selznick Was Entitled to Declare the Retainer Agreement Void Pursuant to Business and Professions Code Section 6147*

The trial court raised the issue of whether the retainer agreement was voidable under Business and Professions Code section 6148. Sayre and Selznick disputed the issue below and dispute the issue on appeal. The trial court and the parties, however, have focused on the wrong statute in the Business and Professions Code. Section 6148 by its terms does not apply to "any case not coming within Section 6147 . . . ." (§ 6148,

subd. (a).) Section 6147 applies where, as here, an attorney represents a plaintiff in litigation on a contingency fee basis. (§ 6147, subd. (a); *Franklin v. Appel* (1992) 8 Cal.App.4th 875, 892.) The retainer agreement therefore was governed by section 6147, not section 6148.[8]

The trial court's application of section 6148 rather than section 6147 was harmless error because the relevant language of both statutes was not materially different in light of the facts of this case. Section 6147, subdivision (a) provides that the attorney shall, "at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client . . . to the *plaintiff*." (Italics added.) Section 6148, subdivision (a) contains precisely the same language, except that the duplicate copy of the contract must be provided to the "client" instead of the "plaintiff." (§ 6148, subd. (a).) By using the term "plaintiff" rather than "client," the Legislature indicated that section 6147 only applied to contingency cases involving clients who are plaintiffs in litigation, and did not apply to all types of contingency matters. (*Franklin v. Appel supra*, 8 Cal.App.4th at p. 892.) Because Selznick was a plaintiff in litigation, section 6147, subdivision (a) applies to the retainer agreement here.

Section 6147, subdivision (b) provides: "Failure to comply with any provision of this section renders the agreement voidable at the option of the *plaintiff*, and the attorney shall thereupon be entitled to collect a reasonable fee." (Italics added.) Section 6148, subdivision (c) contains the same language, except the word "client" is used instead of "plaintiff." (See § 6148, subd. (c).) As discussed, that distinction makes no difference in this case.

Sayre does not dispute that at the time the retainer agreement was entered into, he failed to provide a duplicate copy of the retainer agreement, signed by both parties, to Selznick. Accordingly, under the plain language of section 6147, subdivision (b), the retainer agreement was voidable at Selznick's option. (See *Alderman v. Hamilton* (1988)

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[8] The retainer agreement itself states that the parties are in compliance with section 6147.

205 Cal.App.3d 1033, 1038 [client had absolute right to void contract when attorney did not comply with section 6147].) Because Selznick exercised that option, the retainer agreement was void, and cannot be the basis for a breach of contract cause of action by Sayre.

2. *The Trial Court Did Not Abuse its Discretion By Denying Sayre Leave to Amend His Complaint to Add a Quantum Meruit Cause of Action*

" '[T]he trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.]' " (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) On appeal, the burden is on the appellant to show that a trial court abused its discretion in adjudicating a request for leave to amend. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.)

"Although courts are bound to apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, up to and including trial [citations], this policy should be applied only '[w]here no prejudice is shown to the adverse party . . . .' [Citation.] A different result is indicated '[w]here inexcusable delay and probable prejudice to the opposing party' is shown." (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487.) Under those circumstances, denial of leave to amend is appropriate. (*Ibid.*)

In this case, the trial court found that Sayre "unreasonably delayed in seeking an amendment to the complaint," and that Sayre's delay "caused significant prejudice to the defense." These findings were well within the trial court's discretion. Sayre was aware that Selznick was refusing to pay the costs he advanced as early as June 3, 2004. Yet Sayre waited until August 23, 2007—more than three years later—to seek leave to assert a quantum meruit cause of action to recover those costs.[9]

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[9] Sayre argues that he did not delay in asserting his quantum meruit claim because he attempted to do so immediately after the trial court raised the issue of whether the retainer agreement was void pursuant to section 6148. However, Sayre did not need to

This unexcused delay was prejudicial to Selznick because by the time Sayre's counsel orally requested leave to amend, Sayre had already left for Mexico, and was unavailable for further cross-examination. As the trial court explained: "I think that the theories under which quantum meruit would be raised or argued are entirely different. There are a number of defenses that go to laches, unclean hands that weren't explored on cross-examination of Mr. Sayre. They [Selznick] weren't on notice that they needed to be explored. The passage of time, for example, while immaterial to a breach of contract [claim], if a contract exists, wasn't really adequately explored. But it would be critical to a claim of unreasonable delay."

Sayre's unreasonable and prejudicial delay in seeking to amend his complaint was sufficient ground by itself to deny his motion for leave to amend. In addition, the trial court properly denied Sayre leave to amend because his quantum meruit claim failed on the merits as a matter of law.[10]

"[I]n order to recover under a quantum meruit theory, a plaintiff must establish *both* that he or she was acting pursuant to either an *express or implied request* for such services from the defendant *and* that the services rendered were *intended to and did benefit* the defendant. One court summarized the rule as follows: 'The theory of quasi-contractual recovery is that one party has accepted and retained a benefit with full appreciation of the facts, under circumstances making it inequitable for him to retain the benefit without payment of its reasonable value.' " (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 248 (*Day*).)

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wait until the trial court raised this issue to assert a quantum meruit claim. He could have asserted the claim as an alternative theory of recovery in his initial complaint.

[10] The trial court found that section 6148 prohibited Sayre from recovering costs, as opposed to fees. Sayre argues that this finding was error. We do not reach this issue, or the issue of whether section 6147 prohibited Sayre's recovery of costs, because we find that Sayre's common law quantum meruit cause of action fails for other reasons.

In the present case, Sayre's expenditure of costs purportedly on Selznick's behalf clearly did not benefit her because she did not recover any money in the underlying action. (See *Day*, *supra*, 98 Cal.App.4th at p. 249 [holding that defendant did not benefit from attorney's work because suit did not make it past the liability phase]; see also *Liss v. Studeny* (Mass. 2008) 879 N.E.2d 676, 683 [no quantum meruit recovery for attorney when, after attorney withdrew, client lost at trial in pro per and contingency did not occur].) This deficiency alone bars Sayre's quantum meruit cause of action.

Further, even assuming Selznick "benefitted" from Sayre's "services," i.e., Sayre's expenditure of costs, Selznick did not have a full appreciation of the facts. Sayre did not ask Selznick for approval of the substantial costs he incurred[11] or even inform her of the costs with periodic statements. Selznick was completely unaware of the costs Sayre seeks to recover until they were already incurred. Under these circumstances, it was not inequitable to allow Selznick to retain the "benefit" of Sayre's services without requiring Selznick to pay for them. (See *Day*, *supra*, 98 Cal.App.4th at p. 248.)

Moreover, the statute of limitations bars virtually all or all of the legitimate costs Sayre seeks to recover. The statute of limitations for quantum meruit is two years. (Code Civ. Proc., § 339; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996.) The limitations period begins to run from the time the last service is rendered by the plaintiff to the defendant. (*Johnstone v. E & J Mfg. Co.* (1941) 45 Cal.App.2d 586, 588.)

Here, Sayre filed his complaint on August 22, 2006. Thus Sayre is barred from recovering any costs he incurred on or before August 22, 2004. Of the $56,145.50 of costs Sayre seeks to recover, $54,275.95 was incurred prior to August 22, 2004. Sayre therefore is barred by the statute of limitations from recovering $54,275.95 in costs pursuant to a quantum meruit theory.

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[11] Sayre emphatically testified: "I could not – I would not work for a client who insisted on having some kind of veto control over my expenditure of the costs that I consider, in my professional opinion, necessary for the proper presentation of the case."

The only costs Sayre claims he incurred after August 22, 2004 are the following:

Item #	Date	Expense	Amount
1	9/10/04	American Legal Support Services, Inc. "PAID 2/24/05"	$44.00
2	9/30/04	"Expense Reinb. From 9/1/04 Through 9/30/04" for Hector Salitrero	$24.40
3	10/14/04	"Expense Reinb. From 10/13/04" for Marty V. Miller	$22.20
4	10/25/04	"Expense Reinb. From 10/12/04 Through 10/22/04" for Manuel Mijango	$7.65
5	10/25/04	"Expense Reinb. From 10/12/04 Through 10/22/04" for Manuel Mijango	$11.48
6	3/14/05	Thompson West – "West Information Charges From 9/1/04 Through 3/14/05"	$154.20
7	4/07/05	Whitman Legal Technologies, Inc. "7,345 Heavy Litigation Copies, Video Tape Duplicated."	$1,530.11
8	4/26/05	Expense Reimbursement for Manuel Mijango From 4/18/05 Through 4/26/05 – "Deliver Records to Joan K. Selznick in Los Angeles [¶] PAID"	$15.37
9	5/5/05	Expense Reimbursement for Manuel Mijango From 4/21/05 Through 5/5/05 – "Delivered Documents to the LA Office [¶] PAID"	$11.48
10	5/31/05	Thompson West – "West Information Charges From 5/1/05 Through 5/31/05"	$48.66
			$1,869.55

We are troubled by Sayre's attempt to recover costs he allegedly incurred *after* the court in the underlying action granted him leave to withdraw as counsel on October 13, 2004. These costs (items 7-10) do not appear to be recoverable. In particular, Sayre's

claim for recovery of legal research expenses he incurred in March and May of 2005 is totally unjustified.

This leaves items 1-6, which total at most $263.93, assuming all of these costs were incurred between August 22, 2004 and October 13, 2004. However, these costs are not recoverable because, as explained above, Selznick did not receive any benefit from Sayre's alleged "services." Accordingly, for all of the reasons we have stated, Sayre's request for leave to amend his complaint to add a quantum meruit cause of action was not an abuse of discretion.

3. *The Trial Court Did Not Abuse Its Discretion By Denying Sayre's Motion for a New Trial*

We review an order denying a motion for a new trial under an abuse of discretion standard. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176.) For the reasons stated herein, we hold that the trial court did not abuse its discretion in denying Sayre's motion for a new trial.

A. *Sayre's Conversion Cause of Action*

In his motion for a new trial, Sayre did not expressly request leave to amend his complaint to assert a conversion cause of action. Rather, he argued that the judgment was against law because Sayre should have been allowed to assert a conversion cause of action, which, unlike his quantum meruit claim, was not barred by the statute of limitations.[12]

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[12] The statute of limitations for conversion is three years. (Code Civ. Proc., § 338, subd. (c); *Fabricon Products v. United Cal. Bank* (1968) 264 Cal.App.2d 113, 117.) The limitations period for a conversion claim starts running at the time of the unlawful taking or disposal of the property, regardless of the plaintiff's lack of knowledge of the alleged wrongful act. (*Coy v. E. F. Hutton & Co.* (1941) 44 Cal.App.2d 386, 390; 3 Witkin, California Procedure (5th ed. 2008) Actions, § 622, p. 808.) Thus if Sayre can assert a conversion cause of action, he can recover all property Selznick wrongfully converted on after August 23, 2002 – three years prior to the date he commenced this action.

The trial court had discretion to grant a new trial if "the verdict or other decision [was] against law." (Code Civ. Proc., § 657, subd. (6).) Although Sayre did not seek to assert a conversion cause of action prior to the judgment, the trial court had the discretion to allow Sayre to change his legal theory, so long as the new theory presented a question of law to "be applied to [the] undisputed facts in the record." (*Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15-16 (*Hoffman-Haag*).) Thus, in order to prevail on his motion for a new trial, Sayre was required to show that under the undisputed facts he could prevail on his conversion cause of action.

"Conversion is generally described as the wrongful exercise of dominion over the personal property of another. [Citation.] The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages." (*Freemont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) "It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use." (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 544.)

In the present case, Sayre claims that Selznick converted the money Sayre spent on costs. Money can be converted if a specific, identifiable sum is involved. (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395.) Sayre, however, cannot show that Selznick wrongfully exercised dominion over his money, i.e., that Selznick disposed of Sayre's money in a manner that was inconsistent with Sayre's property rights. At no time did Selznick assume control or ownership of the money Sayre spent on costs; nor did Selznick apply that money to her own use. Thus, as a matter of law, Sayre cannot maintain a cause of action against Selznick for conversion. Accordingly, the trial court's denial of Sayre's

motion for a new trial based on Sayre's purported conversion claim was not an abuse of discretion.[13]

B. *Sayre's Allegation That the Trial Court Was Biased*

A trial court may grant a new trial if "[i]rregularity in the proceedings of the court . . ." deprives either party "from having a fair trial." (Code Civ. Proc., § 657, subd. (1).) There was such an irregularity in this case, Sayre contends, because the trial court was unfairly biased in favor of Selznick when the trial court asked Selznick a series of questions. In particular, Sayre contends that after questioning by his counsel allegedly showed that Selznick had no recollection of pertinent information, the trial court came to Selznick's aide and rehabilitated her.[14] We disagree.

Evidence Code section 775 provides that " '[t]he court, on its own motion or on the motion of any party, may call witnesses and interrogate them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the court directs.'

"From this authority which 'merely codifies traditional case law,' '[n]umerous courts . . . have recognized that it is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible. [Citation.]'

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[13] Sayre's reliance on *Lowe v. Ozmun* (1902) 137 Cal. 257 (*Lowe*) is misplaced. In *Lowe*, the court merely held that a claim for conversion fell within the three-year statute of limitations of Code of Civil Procedure section 338. (*Lowe,* at p. 259.) That is not an issue in this case.

[14] Sayre also complains that the trial court "improperly provided the defense of the voidability of the Retainer Agreement to Respondent's counsel who was not aware of that defense until advised by the Court." This does not, however, appear to be one of the grounds for Sayre's argument that his motion for a new trial was erroneously denied. In any case, we find nothing inappropriate about the trial court raising the issue of whether the retainer agreement was voidable.

[Citation.] ' " [I]t has been repeatedly held that if a judge desires to be further informed on certain points mentioned in the testimony it is entirely proper for him to ask proper questions for the purpose of developing all the facts in regard to them. Considerable latitude is allowed the judge in this respect as long as a fair trial is indicated [to both parties.] Courts are established to discover where lies the truth when issues are contested, and the final responsibility to see that justice is done rests with the judge." ' [Citation.]" (*Conservatorship of Pamela J.* (2005) 133 Cal.App.4th 807, 827.)

"The authority of the trial judge to question witnesses not only applies to cases tried to a jury but also to the court sitting as the fact finder. [Citation.] 'It apparently cannot be repeated too often for the guidance of a part of the legal profession that a judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts. Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed. [Citations].' [Citation.]" (*Conservatorship of Pamela J., supra*, 133 Cal.App.4th at p. 827.)

Here, during Sayre's cross-examination of Selznick, the trial court asked Selznick questions in order to determine whether Selznick had an independent recollection of events, or whether her testimony was based only on reviewing documents at trial. In response to an objection by Sayre's counsel to these questions, the court explained: "I have – for the benefit of any appellate record, I have a witness who is volunteering information, who is not complying with repeated instructions by court or counsel to respond directly to questions, and who is very, ironically for someone who ascribes herself as very intelligent, amazingly inarticulate when it comes to a key issue, which is from whence her recall comes. I would be remiss were I not to explore whether or not this was a story, as originally testified to, fabricated out of the documents in this case, as was the state of the record; or whether or not she simply misunderstood what was being asked of her, and that her recall was in fact an authentic and genuine recall.

"And to the extent that I needed to know that answer, because I am the trier of fact, and I need to know whether or not it is testimony that, under any standard tests of credibility, can be relied upon just as I would Mr. Sayre's testimony, both of them under the distinct disability of the passage of time; or whether or not I am dealing with someone who is so profoundly brain injured, that the ability to recall is really missing. And that was the juncture that the testimony had reached. And for me to leave that record silent with that degree of confusion in my mind as to whether or not it was the product of recall or whether or not it was an invention for the purposes of litigation, would have robbed me of my ability to really discern and ascertain the truth, which at the end of the day is supposed to be what the finder of fact is supposed to do.

"So I take no umbrage at your objection. You needed to make it. I appreciate the state of the record before my inquiry. It is not a question about advocacy. I'm really trying to get the truth of the nature of her [Selznick's] recollection."

We have reviewed the trial court's questioning of Selznick and find that, when placed in proper context, the trial court did not act in an inappropriate way. The trial court could have reasonably determined that it was unclear whether Selznick was capable of independently recalling relevant facts in light of her brain injury. It was not only the trial court's right, but also its duty, to clarify this issue.

Sayre argues that this case is similar to *Pratt v. Pratt* (1903) 141 Cal. 247 (*Pratt*). There, a daughter was called by a father to testify in a case involving a dispute between a father and mother. The trial court interrupted the testimony and stated to the father's counsel: " 'I don't know anything more revolting than to have a child put on the witness-stand to dispute a parent, father or mother. . . . You can use your own choice. I just simply say to you that there is no depth of infamy to which people can sink more than to put their children on the stand to testify against father or mother. I don't know anything that would condemn your client in my eyes so completely as to put that girl on the stand to testify against the mother. You would have to bolster everything he (defendant) said to make me believe anything after he did that. I have very pronounced views on it. It is shocking when a child is offered on the witness-stand to testify to anything that a mother

has said as true or untrue.' " (*Id.* at p. 250.) Subsequently, the trial court stated to father's counsel: " 'You have the liberty to put this girl on and have her testimony. . . I simply want you to understand that it opens the door to prejudice, which every court must have that has a family.' " (*Id.* at p. 251.)

After the trial court made these statements, the father withdrew the witness. (*Pratt, supra,* 141 Cal. at p. 251.) The Supreme Court held that the trial court's conduct amounted to an "irregularity" within the meaning of Code of Civil Procedure section 657, subdivision 1, justifying a new trial. (*Pratt,* at p. 252.)

The present case is clearly distinguishable from *Pratt*. The trial court here did not openly declare its prejudice to one party or its hostility to one party's attempt to call a particular witness. Instead, the trial court simply asked Selznick questions relating to her ability to recall relevant facts. What happened in this case is completely different than what happened in *Pratt*.

4. *Sayre May Not Assert an Open Book Account Cause of Action on Appeal*

Sayre argues that we should vacate the judgment in order to allow him to pursue an open book account cause of action. Sayre never made a motion in the trial court for leave to amend to add this cause of action, nor did he mention the issue in his motion for a new trial.

"Under ordinary circumstances, when a party changes the theory of his case on appeal the appellate court is precluded from reviewing the new theory. [Citation.] This doctrine, known as the 'theory of trial,' is a well-established rule of appellate practice. [Citation.] The application of this doctrine is discretionary, however, and several exceptions have developed. One of the recognized exceptions is that a party may elect to change his theory if the issue only involves a question of law." (*Fenton v. Board of Directors* (1984) 156 Cal.App.3d 1107, 1113; see also *Hoffman-Haag, supra,* 1 Cal.App.4th at p. 15 [". . . on appeal a party may change the legal theory he relied upon at trial, so long as the new theory presents a question of law to be applied to undisputed facts in the record"].)

Here, Sayre cannot show that, as a matter of law, he is entitled to prevail on an open book account cause of action based on the undisputed facts in the record. A book account is "a detailed statement . . . kept in a reasonable permanent form and manner *and* is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonable permanent form or manner." (Code Civ. Proc., § 337a, italics added.) Sayre has not cited anything in the record showing that the requirements of a book account have been satisfied.

Sayre cites a 15-page document entitled "CLIENT COSTS" and a letter dated June 3, 2004, as evidence purportedly supporting his open book account claim. These documents were apparently attached to Sayre's mandatory settlement conference brief. There is nothing in the record, however, indicating that these documents were in a bound book or were fastened to a book. Indeed, there is nothing in the record indicating that these documents were authenticated or described under oath by any witness.[15] We therefore cannot determine from the face of the documents that they constitute a book account. Accordingly, we cannot consider Sayre's book account theory on appeal.

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[15] Although the clerk's transcript contains a "joint exhibit list," it does not contain any documents identified as trial exhibits.

DISPOSITION

The judgment is affirmed. Respondent Selznick is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.